Supreme Court, U. S.
FILED
JAN 11 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-939

DELAWARE STATE COLLEGE, *et al.*,
Petitioners
[Additional Petitioners listed inside cover]

v.

COLUMBUS B. RICKS, *Respondent*

BRIEF FOR RESPONDENT IN OPPOSITION

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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JAMES H. WILLIAMS,
WILLIAM S. YOUNG,
BURT C. PRATT,
LUNA I. MISHOE,
PIERRE S. DUPONT, IV,
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HARRIET R. WILLIAMS,
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EHSAN HELMY,
VERA POWELL,
JOHN R. PRICE,
HERBERT THOMPSON,
W. RICHARD WYNDER,
ULYSSES WASHINGTON, and
JANE LASKARIS.

M. MILFORD CALDWELL died on October 27, 1979.

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Brief for Respondent In Opposition

OPINION BELOW

The opinion of the United States Court of Appeals for the Third Circuit which is reprinted as pages 1a through 18a of the appendix to the petition is reported at 605 F.2d 710 (1979). The opinions of the United States District Court for the District of Delaware are reprinted at pages 20a through 43a and pages 45a through 51a of the appendix to the petition. Neither of the opinions of the United States District Court for the District of Delaware is reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on September 19, 1979. The jurisdiction of this court is invoked under 28 U.S.C Section 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in holding that respondent filed a timely charge of discrimination thereby meeting the time limitation requirements of 42 U.S.C. Section 2000e-5(e).

2. Whether the Court of Appeals erred in holding that an alleged denial of tenure by petitioner, an academic institution, is a process which constitutes a continuing violation.

3. Whether the Court of Appeals erred in holding that respondent had filed the court complaint below alleging national origin discrimination under 42 U.S.C. Section 1981 within the time provided for by the state statute of limitations governing such claims.

4. Whether the Court of Appeals erred in remanding to the District Court the question of whether national origin claim may be raised under 42 U.S.C. Section 1981 for an initial determination of that issue.

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions involved are 42 U.S.C. Section 2000e-5(e) cited at page five of the petition and 42 U.S.C. Section 1981 found at page six of the petition.

STATEMENT OF THE CASE

Respondent, a black male Liberian was employed by petitioner from 1970 to 1975 as a Professor of Education and Coordinator of Science Education. In February, 1973, he was denied academic tenure, but was given another one year contract. In February, 1974, the petitioner's Committee on Promotions and Tenure again recommended that respondent be refused tenure. The petitioner's Board of Trustees met on March 13, 1974 and accepted that recommendation. In April, 1974, respondent filed a grievance with the Educational Policy Committee of petitioner. In May 1974, that Committee, after conducting a hearing, determined that the denial of tenure was proper. In June, 1974, the petitioner's Board of Trustees notified respondent that he was being given a terminal contract for the school year that ran from September 1, 1974 through June 30, 1975. Respondent ceased to be employed with the college on June 30, 1975.

On April 4, 1975, respondent filed a charge of employment discrimination with the Equal Employment Opportunity Commission (EEOC). On June 6, 1977, respondent was sent a right to sue letter by the EEOC. On September 9, 1977, respondent filed a complaint in court. The relevant portions of the complaint allege that he has been discriminated against on the basis of national origin in violation of 42 U.S.C. Section 2000e-5(e) (Title VII) and 42 U.S.C. Section 1981 (1981).

The United States District Court for the District of Delaware dismissed the Title VII claim on the basis that respondent failed to file a charge with the EEOC "within the 180 days after the alleged unlawful employment practice occurred" as required by 42 U.S.C Section 2000e-5(e). The District Court also dismissed the Section 1981 claim as barred by the three year Delaware statute of limitations governing such claims. The District Court also dismissed

several other claims alleged by respondent. Respondent took an appeal from the District Court's dismissal of the Title VII and Section 1981 claims only. On September 18, 1979 the United States Court of Appeals for the Third Circuit entered a judgment reversing the dismissal of the Title VII and 1981 claims and remanding the matter for proceedings consistent with the opinion of the Court of Appeals. It is to review that judgment that petitioner seeks a Writ of Certiorari from this Court.

REASONS FOR DENYING THE WRIT

THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT REVERSING THE DISTRICT COURT ORDER DISMISSING RESPONDENT'S COMPLAINT IS NOT A FINAL ORDER

The effect of judgment of the United States Court of Appeals for the Third Circuit is to remand the Title VII and 1981 claims for reinstitution in the District Court of respondent's case on those issues. As a consequence of the Court of Appeals' order, discovery and trial on the merits of this claim will follow. This Court has held that only final orders are reviewable by certiorari and that a final order is one which disposes of a claim in such a way that no further action is required. *Rodgers v. Hill,* 289 U.S. 582 (1933); *Moore v. The New York Cotton Exchange,* 270 U.S. 603 (1926); *Gulf Refinery Company v. U.S.,* 269 U.S. 125 (1925).

In the instant case the order of the Court of Appeals has not finally disposed of the claim and clearly requires further action. For that reason, petitioner is precluded from seeking review of that order by this Court. Moreover, the fact that this Court has stated that the timely filing of a charge with the EEOC is a jurisdictional prerequisite to suit, as it did in *Johnson v. Railway Express Agency, Inc.,*

421 U.S. 454 (1975) does not create an exception to the principle that this Court will only consider exercising its discretion to grant certiorari where there is a final order. *Catlin v. United States,* 324 U.S. 299, 236 (1945). Specifically, this court has held that an appellate court decision that reverses the decision of a trial court and requires further proceedings is not a final order and is not reviewable by way of certiorari. *Southern Pacific Company v. Gileo,* 351 U.S. 493, 495, 496 (1956). As the identical procedural situation exists here that existed in *Southern Pacific v. Gileo,* this court should deny the writ.

ASSUMING ARGUENDO THAT THE COURT OF APPEALS' ORDER IS A FINAL ORDER, NO TRUE CONFLICT EXISTS AMONG THE CIRCUITS

Petitioner argues that the ruling of the United States Court of Appeals for the Third Circuit is in conflict with rulings of the Ninth, Fourth, Fifth and Eighth Circuits. When one examines carefully the cases cited by petitioner, it is apparent that any conflict between these circuits and the Third Circuit, if any exists at all, is in fact either superficial with respect to a conflict with the Ninth Circuit or results from a misinterpretation of the courts' decisions, by the petitioner with respect to the decisions of the Fifth and Fourth and Eighth Circuits.

Specifically, petitioner cites the case of *Abramson v. University of Hawaii,* 594 F.2d 202 (9th Cir. 1979) as being in conflict with the decision of the Court of Appeals in the instant case. A careful examination of both cases reveals that in fact on substantially similar, though not identical facts, they have been disposed of by each circuit in a similar way. In *Abramson,* the Ninth Circuit reversed the District Court's grant of a motion for summary judgment against the plaintiff and by doing so, effectively accorded the plaintiff in that case the opportunity for a trial on

the tenure process. Petitioner relies on language quoted from *Abramson* which indicates a disagreement with cases decided by District Courts within the Third Circuit as the basis for arguing that there is a conflict between the decisions of the Ninth and Third Circuits.

In effect, the decision in *Abramson* is similar to that reached below and no real conflict exists. In *Abramson*, the Court of Appeals remanded the case to allow the plaintiff the opportunity to prove that in fact the violation alleged did continue after the effective date of the act, *i.e.*, March 24, 1972. In reality this result is no different from the result of the Court of Appeals in the instant case where the respondent will be afforded the opportunity to demonstrate the actual continuing process by which tenure was denied him and by which his employment was terminated within 180 days of the filing of his charge with EEOC.

Bracamontes v. Amstar Corporation, 576 F.2d 61 (5th Cir. 1979) and *Farris v. Board of Education of St. Louis*, 576 F.2d 765 (8th Cir. 1978) arose on a set of facts similar to facts in *Masco v. United Airlines*, 547 F.2d 1127 (3rd Cir. 1978) in which the Third Circuit reached a conclusion similar to that of the Fifth Circuit in *Bracamontes* and the Eighth Circuit in *Farris*. In all three of these cases the Courts of Appeals found where there was a hiatus of more than 180 days between the time the plaintiffs ceased to be employed or were laid off because of alleged discrimination by the employer, and the alleged subsequent act of discrimination, which new act was not in itself alleged to be discriminatory, the claim should be dismissed as untimely. All three of those courts followed the holding of this Court that the present effect of past discrimination which occurred more than 180 days before the filing of a charge with the EEOC was not redressable in a court suit. *United Airlines v. Evans*, 431 U.S. 553 (1977).

Clearly, the Third Circuit in the instant case has made a distinction between the factual situation in *Masco*,

Bracamontes, and *Farris* on the one hand, and the factual situation in the present case which is similar to the circumstances in *Abramson* where similar results were achieved on similar reasoning by the Court of Appeals.

Moreover, the decision of the Third Circuit below is consistent with decisions of the Second Circuit on this issue of timeliness of charges raising the issues of discriminatory denial of tenure and promotion in a similar factual context. *Egelston v. State College at Genesco*, 535 F.2d 752 2nd Cir. 1976) and *Noble v. University of Rochester*, 535 F.2d 756 (2nd Cir. 1976)

Martin v. Georgia Pacific Corporation, 568 F.2d 58 (5th Cir. 1977) cited by petitioner to demonstrate a conflict between the Fifth and Third Circuits raised the issue of the timeliness of a Title VII charge on a decidedly different set of facts. In that case the plaintiff, unlike the instant case, conceded by deposition testimony that:

1. the alleged discriminatory acts were not continuing and
2. that no act of discrimination had occurred within the satutory period of time required.

Friend v. Leidinger, 588 F.2d 61 (4th Cir. 1978) also cited by petitioner for the purpose of showing a conflict between the Fourth and Third Circuits does not present a real conflict between the circuits as the Fourth Circuit simply acknowledged in passing the rule that to be the basis of a court action, a charge of discrimination must be filed within 180 days of an act of discrimination. In *Friend*, the court merely identified the fact that with respect to the issue of testing, as it allegedly discriminated against black firemen, the court would only consider tests given within 180 days of the filing of the charge with the EEOC. It is not evident from the opinion, whether other tests were alleged to be discriminatory or whether plaintiffs alleged

that the testing of the defendant fire department constituted a continuing discrimination pattern against black firemen. In view of the ambiguity of the basis of the court's decision on this issue, and in the absence of a clear indication that the court was making a determination that no continuing violation existed, petitioner's reliance on this case in support of its proposition that a true conflict exists is unfounded.

Petitioner also cites *Myers v. Pennypack Woods Home and Ownership Association*, 559 F.2d 1127 (3rd Cir. 1978) and *Masco v. United Airlines, supra*, in support of the proposition that actions that do not occur within 180 days of the filing of a charge with EEOC or of a court complaint under a federal fair housing statute[1] are time barred. Those cases do support that proposition, however, it is clear that both cases are Third Circuit cases, that the Third Circuit below was aware of both of the cases, and indeed expressly ruled that the instant case was distinguishable from the ruling of *Masco* on the basis of the facts of the case. Even assuming for the sake of argument that the cases are inconsistent with the instant case, they represent an intra circuit inconsistency, and as such, are not of such significance that requires review by this court.[2]

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1. U.S.C. 3612(a), Section 3612(a) provides in pertinent part:

> (a) The rights granted by sections 3603, 3604, 3605 and 3606 of this title may be enforced by civil action in appropriate United States district courts without regard to amount in controversy and in appropriate State or Local courts of general jurisdiction. A civil action shall be commenced within one hundred and eighty days after the alleged discriminatory housing practice occurred. . . .

2. Harlan, *Some Aspects of the Judicial Process in the Supreme Court of the United States*, 33 Austl. L.J. 108, 111 (1959).

ASSUMING ARGUENDO THAT THE COURT OF APPEALS' ORDER IS A FINAL ORDER, THE DECISION BELOW NEITHER MISINTERPRETS NOR FAILS TO APPLY THE RULE OF THIS COURT AS FORMULATED IN UNITED AIRLINES, INC., v. EVANS, 431 U.S. 553 (1977) REGARDING 42 U.S.C. SECTION 2000e-5(e)

Petitioner argues that the Third Circuit held in the instant case that it was not bound by the holding of this Court in *United Airlines v. Evans*. In fact the circuit court distinguished the factual situation of *United Airlines v. Evans* from the instant situation. Petitioner argues that the fact that the Third Circuit accorded a different ruling to the facts of the instant case from that which this Court accorded the *Evans* facts is a limitation of the precedential value of *Evans* to situations involving terminations. The difference in treatment accorded this case by the Third Circuit is explainable by the fact that it found a continuing violation in the instant case. A review by this Court of the Third Circuit's determination would be a review of a narrow set of facts distinct and distinguishable from the facts in *Evans* and one not worthy of this Court's attention. The holding of the Court of Appeals in the instant case on its facts is not clearly inconsistent with the holding of this court in *United Airlines v. Evans* as evidenced from the Court of Appeals' distinguishing the instant case from its own holding in *Masco v. United Airlines* where on facts similar to the *Evans* facts the Third Circuit clearly following the ruling of this Court.

ASSUMING ARGUENDO THAT THE COURT OF APPEALS ORDER IS A FINAL ORDER, THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS AS TO THE PROPER INTERPRETATION AND APPLICATION OF THE APPROPRIATE STATUTE OF LIMITATIONS GOVERNING 42 U.S.C. SECTION 1981

The heading of petitioner's argument suggests that the decision of the Court of Appeals in the instant case with respect to the statute of limitations applicable to the 1981 claim is diametrically opposed to a decision of this Court on the same issue involving the same statute.

A reading of the cases of this Court cited by the petitioner as controlling indicates that those cases involved statutes of limitations governing personal injury claims arising out of two separate statutes. Neither of the cases cited deals with the issue of when the statute of limitations commences to run on a 1981 claim. Nothing in either of those cases justifies petitioner's assertion that the holding of the Court of Appeals in the instant case is inconsistent with those cases. Indeed, if anything, *Urie v. Thompson*, 337 U.S. 163 (1949) which is cited with approval in *United States v. Kubrick*, 48 U.S.L.W. 4030 (11-27-79), is supportive of the proposition that federal courts should carefully examine the particular facts of a case to make a determination as to when a statute of limitations starts to run, and clearly suggests that that time may vary based on the particular facts of the case. Although it was clear in *Urie v. Thompson*, that the medical condition for which plaintiff sought damages had long been in existence, the statute of limitations on his claim did not commence to run until such time as he was diagnosed as having the condition, which time was within the three-year statute of limitations.

To the extent that *United States v. Kubrick,* holds that a statute of limitations begins to run no later than when a person is aware of his injury and its probable cause, which in *United States v. Kubrick,* occurred when plaintiff's physician told him that the hearing loss which he had recently suffered was the result of medicine administered to him at a government hospital, and that advice was given plaintiff at a point outside of the statute of limitations, it is not inconsistent with the Third Circuit's holding on a radically different set of facts and circumstances that given the nature of the tenure process plaintiff knew his injury, the discharge and its probable cause. and filed this court complaint within the three-year statute of limitations which petitioner concedes to be controlling.

Further, the holding of *Bernard v. Gulf Oil Company,* 596 F.2d 1249 (5th Cir. 1979), cited by petitioner as evidence of a conflict between the circuits on the issue of applying the statute of limitations to a 1981 claim, is in fact consistent with the holding of the Third Circuit in the instant case on this issue. In *Bernard* the court held at p. 1255 that ". . . the relevant date for the purposes of the statute of limitations is the *last* date on which defendants improperly harmed plaintiff. . . ." Clearly, the Court of Appeals in the instant case found that date to be June 30, 1975. Any court complaint filed on this claim after June 30, 1978 would be untimely. As the instant court complaint was filed in September, 1977, it was filed within the time from which the statute of limitations, as defined by the court in *Bernard v. Gulf Oil Company,* commences to run.

ASSUMING ARGUENDO THAT THE COURT OF APPEALS ORDER IS A FINAL ORDER, THE DECISION OF THE COURT OF APPEALS TO REMAND THE ISSUE OF WHETHER RESPONDENT STATED A COGNIZABLE NATIONAL ORIGIN DISCRIMINATION CLAIM UNDER SECTION 1981 DOES NOT REQUIRE REVIEW BY THIS COURT.

The record is clear that the Court of Appeals refrained from affirming the dismissal of the 1981 claim on the alternative basis that the claim for national origin was improperly brought under 1981. Petitioner cites in support of its claim of error by the Court of Appeals in remanding for decision by the District Court, the case of *California Banker's Association v. Shultz*, 416 U.S. 21, 71 (1974). Though that case supports the proposition that alternative holdings may be made on appeal, it does not support a conclusion that error of a magnitude deserving this Court's attention occurred.

Petitioner has cited lower court decisions which have in fact held that 1981 does not protect a plaintiff from national origin discrimination. However, one of the cases cited, *Manzanares v. Safeway Stores, Inc.*, 593 F.2d 968 (10th Cir. 1979), recognizes national origin discrimination as redressable if it is raised to identify treatment different from that accorded white citizens. Additionally, cases not cited by petitioner, but cited to the Court of Appeals below by respondent have allowed plaintiffs to proceed where there appear to be allegations that the national origin claim is racially connected.[3]

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3. *Davis v. County of Los Angeles*, — F.2d —, 13 FEP Cases 1217 (9th Cir. 1976); *Miranda v. Clothing Workers, Local 208*, — F.Supp. —, 10 FEP Cases 557 (D. NJ 1974); *Maldonado v. Broadcast Plaza, Inc.*, — F.Supp. —, 10 FEP Cases 839 (D. Conn. 1974).

For this issue to merit the review by this Court there would at least have to appear to be a real conflict between circuit courts that have actually decided this issue. Cases cited by petitioner are, with one exception, district court cases disposing of the issue in a rather summary fashion and are not reviewable by this Court. Only one case, *Manzanares,* is a Court of Appeals case and the decision in that case actually contradicts petitioner's argument that 1981 does not protect alleged national origin discrimination.

Moreover, the instant case does not present a conflict between any earlier decision of this Court and that of the Court of Appeals below which decided to allow the District Court to decide this issue in the first instance. This Court should await the presentation of this issue in a more appropriate vehicle than the instant case, one where it is clear that the Court of Appeals' declining to decide the issue raises a conflict either with the decision of another circuit or with the decision of this Court.

CONCLUSION

For the foregoing reasons the petition for Writ of Certiorari should be denied.

Respectfully submitted,

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